IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Date of decision: 09.04.2007

Criminal Appeal NO. 404 of 2001
(Old No. 2137 of 1997)

A.F.R. (Approved for Reporting)
Not approved for Reporting

(Initial of Judge)

Date: 09.04.2007

Note: Bench Reader will attach this at the top of first page of the judgment when it is it put up before the Judge for signature.

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Appeal No. 404 of 2001

(Old No. 2137 of 1997)

1. Suresh
2. Sukhbir, sons of Balla Singh
   Both Residents of Village Alawalpur
   P.S. Laxar, District Haridwar

……..Appellants

Versus

State

……Opposite Party.

Sri S.K. Agarwal, Senior Advocate assisted by Sri G.K. Verma, learned counsel for the appellants.
Sri G.S. Sandhu, learned G.A. for the State.

Coram: Hon'ble J.C.S. Rawat, J.
Hon'ble Prafulla C. Pant, J.

[Per Prafulla C. Pant, J.]

This is an appeal, preferred under Section 374 of Code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.), is directed against the judgment and order dated 21.11.1997 passed by learned Additional Sessions Judge, Haridwar in Sessions Trial No. 54 of 1990, whereby appellant no. 1 Suresh has been convicted under Section 302 of Indian Penal

Code, 1860 (hereinafter referred as I.P.C.), and appellant no. 2 Sukhbir has been convicted under Section 302 read with Section 34 of I.P.C.. Each of the convict has been sentenced to undergo imprisonment for life.

(2) Heard learned counsel for the parties.

(3) The prosecution story in brief is that in the intervening night of 9th and 10th January 1990 at about 3.00 a.m. in Village Alawalpur, within the limits of Police Station Laxar, District Haridwar, Padam Singh (deceased) was murdered by Suresh (appellant no. 1) on exhortation by Sukhbir (appellant no. 2). Prosecution case is that about 7-8 days before the said date the wheat crop of P.W. 3, Meghraj Singh (father of the deceased) was damaged by accused appellants Suresh and Sukhbir, on which there had been some altercations between the accused and family of deceased Padam Singh. The accused gave a threat to Padam Singh that they would kill him. In the intervening night of 9/10th January 1990, P.W. 1, Nirmal Singh (brother of the deceased), along with P.W. 2, Nepal Singh and one Teerath Singh had gone to their tube-well to irrigate their fields. At the time of the incident, at about 3.00 a.m. P.W. 1, Nirmal Singh was irrigating his field at some distance from the tube-well. The deceased, Padam Singh and P.W. 2, Nepal Singh along with Teerath Singh were stepping up the staircase inside the KOTHRI (a one room structure) near tube-well. As soon as Padam Singh, who was ahead of the three, stepped on the roof, accused Suresh fired a shot from a country made pistol at him.

Padam Singh suffered the firearm injury and died on the spot. Accused Suresh and Sukhbir were seen by P.W. 2 Nepal Singh and Teerath Singh in an electric light while on hearing the sound of the fire P.W. 1, Nirmal Singh saw the two running away from the place of incident. P.W. 1, Nirmal Singh, thereafter, went to his house in the village and informed his father (Meghraj Singh). P.W. 3 Meghraj Singh, in the morning got First Information Report (Ext. A-1) scribed, and lodged the same on 10.1.1990 at about 10.15 a.m. with the Police Station Laxar. P.W. 7 Head Constable Madan Pal Singh prepared the check report (Ext. A-9) on the basis of the First Information Report and made necessary entry in the general diary, an extract of which is Ext. A-10. The investigation was taken up by Station Officer Jagdev Singh (P.W. 8). He along with Sub Inspector Y.K. Sharma (P.W. 5) and other necessary police force went to the village. P.W. 5 Y.K. Sharma, on instructions from the Investigating Officer took the dead body of the deceased Padam Singh in his possession and prepared inquest report (Ext. A-2), sketch of the dead body (Ext. A-3), police form no. 13 (Ext. A-4) and letter (Ext. A-5) to Chief Medical Officer requesting for postmortem examination. P.W. 4 Constable Alamgir Khan along with Constable Narendra Kumar Tyagi took the dead body in a sealed condition for postmortem examination. P.W. 6 Dr. H.K. Pholoria conducted the postmortem examination on 11.1.1990 and prepared autopsy report (Ext. A-8). He opined that the deceased had died due to shock and haemorrhage as a result of ante mortem injuries. Meanwhile, the Investigating Officer interrogated the witnesses, and

prepared the site plan (Ext. A-13) and completion of the investigation submitted charge sheet (Ext. A-14) against both the accused namely, Suresh and Sukhbir.

(4) The Magistrate on receipt of the charge sheet, after giving necessary copies to the accused as required under Section 207 of Cr.P.C. committed the case to the Court of Sessions for trial. The learned Additional Sessions Judge, to whom the case was transferred for trial, after hearing the prosecution and the defence, on 6.1.1992 framed charge of offence punishable under Section 302 of I.P.C. against accused Suresh and that of one punishable under Section 302 read with Section 34 of I.P.C. against accused Sukhbir. Both the accused pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Nirmal Singh, brother of the deceased, who alleged to have seen the incident, P.W. 2 Nepal Singh, relative and eye witness, P.W. 3 Meghraj Singh, informant and father of the deceased, P.W. 4 Constable Alamgir Khan, who took the dead body for posrmotem examination, P.W. 5 Sub Inspector Y.K. Sharma, who prepared the inquest report and other necessary papers, P.W. 6 Dr. H.K. Pholoria, who conducted the postmortem examination, P.W. 7 Head Constable Madan Pal Singh, who prepared the check report (Ext. A-9) and P.W. 8 Station Officer Jagdev Singh, who investigated the crime. The oral and documentary evidence was put to the accused Suresh and Sukhbir under Section 313 of Cr.P.C. who alleged the same to be false. In reply to the queries relating to the prosecution evidence, the alleged that they have been falsely implicated

due to enmity. Both the accused are real brothers. No evidence in defence was adduced. The trial court after hearing the parties found both the accused guilty of the charge framed against them and convicted and sentenced them as mentioned above. Aggrieved by said judgment and order dated 21.11.1997, this appeal was preferred before Allahabad High Court in the year 1997, from where it has been received by transfer under Section 35 of U.P. Reorganization Act 2000 for its disposal.

(5) Before further discussions, it is pertinent to mention here the ante mortem injuries found on the dead body of Padam Singh (deceased) at the time of postmortem examination. Statement of P.W. 6 H.K. Pholoria read with postmortem examination report (Ext. A-8) shows following ante mortem injuries found on the person of the deceased at the time of autopsy:-

(i) ***Lacerated gun shot wound of entry 3cm x 4 cm x chest cavity deep on right side front chest at the level of right nipple, 9 cm from mid line directing downward and to the left. Blackening present around the wound margin. Underlying 4th and 5th rib are fractured on right side. On exploration of the wound right lung was found lacerated Pericardial cavity contained 1000 c.c. of clotted blood.***

15 pallets and a piece of wad recovered from the pericardial cavity.

In the opinion of the Medical Officer, the cause of death was shock and haemorrhage as a result of ante mortem injuries. The aforesaid report (Ext. A-8) establishes the fact that Padam Singh died homicidal death about a day before the autopsy. It further reveals that he received firearm injury as a result of which he died.

(6) Now, the question is who has caused death of Padam Singh (deceased). The prosecution in support of the prosecution story has examined P.W. 1 Nirmal Singh, who says that he saw the accused running from the seen of occurrence. P.W. 2 Nepal Singh, who says that he was with the deceased at the time when accused Suresh fired the shot at Padam Singh. This Court in its appellate jurisdiction has to examine to what extent the statement of this witness is truthful. As per the prosecution story, the incident is of night (i.e. of 3.00 am in the morning). The first thing prosecution has to explain is the source of light, in which the witnesses had seen accused. P.W. 2 Nepal Singh has stated that there was electric bulb lying on the roof of the KOTHRI, in which he could see the accused.

(7) P.W. 2 Nepal Singh has stated on oath that on the fateful day, he along with Nirmal Singh and Teerath Singh had gone to irrigate their fields at about 9 p.m.. The witness further states that at mid-night, they could start the tube-well. P.W. 2 Nepal Singh further states that Nirmal Singh (P.W. 1) was irrigating his field at about 3.00 a.m.. The witness further narrates that he heard some sound of foot steps on the

roof of the KOTHARI of the tube-well on which he along with Padam Singh and Teerath Singh started steeping up the stair-case to reach on the roof of the KOTHARI. When they were stepping up, Padam Singh was ahead of him. As soon as Padam Singh stepped on the roof, accused Suresh fired from the firearm at Padam Singh. Both of Suresh and Sukhbir thereafter jumped from the roof and ran away. The witness states that he saw the incident in the electric light. We have to examine how far the testimony of this witness is trustworthy. The witness has been cross-examined at length by the defence. Nothing has come in his cross-examination, which creates any doubt on the ring of the truth the accused Suresh caused firearm injuries on the person of Padam Singh.

(8) The motive of commission of crime has been explained by P.W. 3 Meghraj Singh, father of the deceased. P.W. 3 Meghraj Singh has stated on oath that some 7-8 days before the date of incident accused Suresh and Sukhbir damaged his wheat crop on which his son Padam Singh (deceased) objected and there had been altercation between his son and the accused. This witness further corroborates the fact that the accused gave a threat to kill Padam Singh. P.W. 3 Meghraj Singh has further corroborated the fact that his son Nirmal Singh had gone to irrigate the field in the night of 9/10th of January 1990. He came at about 3.30 a.m. and told him about the incident. This witness says in the morning at about 6.30 a.m. he got scribed the report Ext. A-1 and lodged the same with the Police.

(9) As far as the testimony of P.W. 1 Nirmal Singh is concerned, his statement as to the fact that there had been quarrel between Padam Singh and the accused some 7-8 days before the date of incident, and also regarding the fact that he had gone to irrigate the field in the night is reliable and gets corroboration from the other evidence on record. However, his statement that he saw accused Suresh and accused Sukhbir running from the place of incident appears to be doubtful and exaggeration. Learned counsel for the appellants argued that the only source of light was the electric bulb on the roof of the KOTHARI and at that time this witness Nirmal Singh was irrigating his nearby field. He rushed to the place of incident only after hearing sound of the firearm. By the time he would have reached towards the KOTHARI the accused, who are said to have been immediately ran away after firing a single shot by jumping from the KOTHARI could not have been seen by this witness in the darkness as it has come on the record that field where Nirmal Singh was irrigating was on the East of the KOTHARI while the accused ran away towards the North of the said place. We are in agreement with the submission of the learned counsel for the appellants that testimony of this witness is doubtful to the extent he saw accused Suresh and Sukhbir running from the place of incident. We cannot ignore the fact that the night was dark of the month of January and also it has come on the record that in the morning there was dense fog all round due to which P.W. 3 Meghraj Singh reached late at the Police Station. Apart from this, the site plan (Ext. A-13) also does not disclose from

where (or from what distance) Nirmal Singh witnessed accused running.

(10) But, as far as the testimony of P.W. 2 Nepal Singh is concerned, who was just behind Padam Singh in stepping up the stair-case, had every opportunity to see the person who fired shot at the deceased. The site plan and the statement of P.W. 8 Jagdev Singh, Investigating Officer also corroborates the fact that there was an electric bulb on the roof of the KOTHARI of tube-well.

(11) It is settled principle of law that the evidence of a single eye witness is sufficient to convict the accused provided the same is reliable and corroborated from the evidence on record. Statement of P.W. 2 Nepal Singh that accused Suresh fired shot at Padam Singh not only gets corroboration from the medical evidence on record as mentioned above but also from the motive narrated by P.W. 3 Meghraj Singh and the electric bulb found by the Investigating Officer at the time of inspection.

(12) As to the role of exhortation given by prosecution to another accused Sukhbir is concerned, we scrutinized the evidence on record in this regard also. Accused Suresh and accused Sukhbir are real brothers and it has come on the record that they had enmity with the family of Padam Singh. The false implication of Sukhbir, who is brother of the main accused Suresh cannot be ruled out in view of the admitted enmity between the parties. However, the same cannot be

said with regard to accused Suresh for the reason that P.W. 2 Nepal Singh, who had every opportunity to see the person firing the shot and who is also relative of the deceased would be the last person to let the real culprit go caught free. Otherwise also there is no sufficient evidence of prior meeting of minds between accused Suresh and Sukhbir for commission of murder of the deceased.

(13) Learned counsel for the appellants argued that the blackening found around the wound of entry of gun shot on the person of the deceased could not have been occurred unless the fire was point blank as the post mortem report shows that the deceased had put on KURTA, Sweater and blanket also. We do not find any reason to disbelieve the prosecution story narrated by P.W. 2 Nepal Singh as against accused Suresh for the reason that the witness (P.W. 2) has stated that when Suresh fired shot, he was at a distance of 2-3 steps away from him (deceased). Between this witness and accused Suresh was the deceased Padam Singh. As such the fired shot was nothing but a close range fire and the blackening found on the person of the deceased does not create any reasonable doubt in the manner the fire is said to have been shot rather it corroborates the prosecution story.

(14) Lastly, it is argued on behalf of the appellants that the First Information repost is ante timed. We do not see any sufficient reason to come to the conclusion that the First Information Report is ante timed. P.W. 3 Meghraj Singh has stated that after he received the information through his son

P.W. 1 Nirmal Singh about the incident at about 3.30 a.m., there was shock, and the members of the family started wailing in the sadness. He further told that at 6.00-6.30 a.m. villagers advised him to stop weeping and lodge the report of the incident with the Police. The distance between the Police Station and the place of incident, as per evidence on record, is 12 kms. In the foggy morning, the witness states that after arranging the tractor, he reached the Police Station at 10.15 a.m. and lodged the report (Ext. A-1), which he got prepared in the village in early morning at 6.00-6.30 a.m.. The testimony of the witness regarding lodging report at 10.15 a.m. does not create any doubt. It is natural that in such circumstances where death has occurred, one would take sometime to recover from the shock before lodging the First Information Report. The inquest report (Ext.A-2) shows that at 12.30 p.m. on 10.1.1990, the dead body was taken into possession and inquest report was prepared at about 1.10 p.m.. This further corroborates apart from the extract of the general diary (Ext. A-10) that the First Information Report is not ante timed.

(15) On behalf of the convict appellants attention of this Court is drawn to the infirmities committed by Investigating Officer in preparing the site plan (Ext. A-13). However, we are of the view that the short comings in the investigation are relevant only if they are sufficient to shatter the ring of truth in the prosecution story. In State of West Bengal Vs. Veer Mohd. Umar 2000 (8) SCC page 382, the Apex Court has observed-

"castigation of investigation unfortunately seems to be regular practice when the trial Court acquit the accused in criminal cases. In our perception it is almost impossible to come across a single case wherein, the investigation was completely, flawless or was absolutely fool proof. The function of criminal courts should not be wasted in picking out the lapses in investigation……"

(16) From the above discussions of evidence, we are of the view that where the charge of 302 of I.P.C. as against the accused appellant Suresh is proved on the record, the same cannot be said regarding accused appellant Sukhbir, who is said to have the common intention in commission of murder of Padam Singh (deceased). For the reasons we have mentioned above, in our opinion it is not proved beyond reasonable doubt that accused Sukhbir had common intention with accused Suresh in commission of the murder of the deceased. Therefore, accused appellant Sukhbir is entitled to the benefit of reasonable doubt.

(17) Accordingly, appeal of accused appellant Sukhbir deserves to be allowed while that of accused appellant Suresh is liable to be dismissed. Therefore, the conviction and sentence recorded by the trial court against accused appellant Sukhbir is set aside, and he is acquitted of the charge of offences punishable under Section 302 read with Section 34 of I.P.C., giving him benefit of reasonable doubt. But the conviction and sentence recorded by the trial court as against accused appellant Suresh under Section 302 of I.P.C. is

affirmed. Appeal of the accused appellant Suresh stands dismissed while that of accused Sukhbir stands allowed. Sureties of the accused appellant Sukhbir stand discharged. He need not to surrender. However, bail of accused appellant Suresh is cancelled. The trial court is directed to take the accused appellant Suresh into custody to make him to serve out the sentence of imprisonment for life, awarded against him.

(Prafulla C. Pant, J.) (J.C.S. Rawat, J.)

Dt. 9th April, 2007
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